86-362

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

HOUSE OF WHEAT
and
WAYNE WHEAT

Petitioners,

vs.

CLIFF WRIGHT, et. al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To The Second District Court of Appeals
For Montgomery County, Ohio

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QUESTIONS PRESENTED

I

WHETHER "FALSE LIGHT" IS A VIABLE CAUSE OF ACTION WHICH CAN BE MAINTAINED WITHOUT PROOF OF "ACTUAL MALICE".

II

WHETHER THE PRIVILEGE OF NEUTRAL REPORTAGE CAN ONLY PROTECT FAIR AND IMPARTIAL REPORTS, WHICH REPORTS ARE NEITHER FAIR NOR IMPARTIAL WHEN THEY CONTAIN EMBELLISHMENTS OR INTERPRETATIONS.

III

WHETHER THE STATUTORY PRIVILEGE CREATED BY R.C. OF

OHIO, §2317.04 IS AVAILABLE TO PUBLISHERS OF DEFAMATORY MATERIAL WHERE THE MATTER REPORTED WAS NOT "PRESENTED, FILED, OR ISSUED" IN ANY LEGAL PROCEEDING.

IV

WHETHER THE PRIVILEGE GIVEN TO NEWSMEN AND CERTAIN OTHERS TO MAKE STATEMENTS ABOUT NEWSWORTHY EVENTS APPLIES WHERE THE PUBLISHER THEREOF ESPOUSES OR CONCURS IN THE DEFAMATORY CHARGES MADE OR OTHERWISE DELIBERATELY DISTORTS THE STATEMENTS IN LAUNCHING A PERSONAL ATTACK.

PARTIES BELOW

The caption of this case not containing the names of all the Respondents, the following names are disclosed:

(1) Clifford Wright

(2) Jack Hurley

(3) Richard Nordstrum

(4) Miami Valley Broadcasting Corp.

(5) Channel 7, WHIO TV

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PETITION FOR WRIT OF CERTIORARI
To The Second District Court of Appeals
For Montgomery County, Ohio

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioners, House of Wheat and Wayne Wheat, respectfully pray that a Writ of Certiorari issue to review the

judgment of the Second District Court of Appeals, which judgment became final on April 9, 1986 when the Supreme Court of Ohio denied further review.

OPINIONS BELOW

The judgment entry by the Supreme Court of Ohio denying further review is set forth at Addendum "A" in the Addendum to this Petition, at page Add. 1.

The Journal Entry of the Ohio Court of Appeals, the judgment to which this petition is directed, is designated Addendum "B", at page Add. 2, et.seq.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on April 9, 1986. The time for seasonably filing this Petition was extended to and including August 7, 1986. (See Addendum "C", infra, p. Add.

109.) The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254 (17).

STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant constitutional and statutory provisions involved in this case are set forth as Addendum "D", to this Petition.

STATEMENT OF THE CASE [1/]

As appellants, Wayne Wheat and The House of Wheat, appealed from the judgment of the Court of Common Pleas in and for Montgomery County, Ohio, where summary judgments were granted to the defendants on various tortious claims made against them for damages. The

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1/ All references to the transcript of this case are designated by the prefix "R". All references designated App. _____ are to the separately bound Appendix filed in the Court of Appeals. The references designated Add. " ", p. ___ are to the Addendum to this Petition.

appellants also appealed from the jury verdicts rendered in favor of the defendants and from the final judgments and orders entered thereon. This appeal, on questions of law, resulted in an Opinion and Journal Entry affirming the trial court's actions in the various contexts in which it was assailed. It also validated the verdicts rendered by the jury.

The petitioners filed a civil action against the various respondents herein charging defamation, invasion of privacy, and interference with economic relation. These actions were based on the content of certain television news broadcasts, wherein the respondents (news media employees of a television station) made the charge that Wayne Wheat and The House of Wheat were responsible -- in other words criminally liable, for disposing of

the human viscera that had been found along the banks of the Great Miami River.

Indeed, the public was made aware that the acts attributed to the petitioners were criminal offenses. Additionally, the broadcasts included an interview with Wayne Wheat that had been surreptitiously filmed or taped. As to this specific broadcast, the facts show that while Wayne Wheat did consent to being interviewed by Cliff Wright, the newscaster, he expressly refused to give his consent to being recorded or filmed. Simply put, Wayne Wheat only consented to being interviewed if it was not recorded and reported (App. 927-930). The facts, as testified to by Wayne Wheat, both on deposition and at the trial, showed one of the respondents (Nordstrum) put the camera down and took a seat before the

interview started. Doubtlessly this act was wilfully designed to conceal the fact that they fully intended for Wayne Wheat to be taped despite his expressed wishes to the contrary. Also, it should not go unnoticed that what was, in fact, broadcast to the public was not a continuous segment. Rather, pieces were spliced together so as to make it appear to the public that the broadcast segment was an intact and continuous interview (R 721).

Next, the proof also showed the public was specifically told that Wayne Wheat had in fact utilized a "dumpster", said to be on The House of Wheat's property, to actually dispose of human viscera (R 117). (Also see App. 244.) This happened despite the incontrovertible proof that neither of these petitioners had ever had, owned or

used, a dumpster for any purpose. Their proof further showed there had never been a dumpster on their premises as represented, both, pictorially and verbally in the assailed broadcast (R 982, 998).

The facts reveal that while the broadcasters continued to maintain they had personal verification from the company who actually serviced the "dumpster" referred to by them in their broadcast, that they had reportedly seen viscera therein (App. 519, 533) the judges involved in this case allowed them to find refuge behind what was said to be their privilege. (See R 885-893 and App. 70, 155.)

Other facts revealed what truly must be a classic example of how to injure a target. Here, we refer to the fact that these broadcasters actually told the

viewing public that a "complaint" had indeed been filed against Wayne Wheat for instructing a former employee to improperly handle human viscera (R 117).

While the above recited proof shows the respondents simply were not interested in whether or not their comments were true, other facts revealed (as an additional predicate for our Motion to Compel) that the petitioners contacted and received disclaimers from all the dumpster companies in the Dayton area. This effort was made by the petitioners in quest of any company that could possibly have claimed to have done business with, either, Wayne Wheat or The House of Wheat. Despite the sufficient assurances that none of the companies ever told the broadcasters anything that could possibly have served as a basis for the testimony given as some verification

for these broadcasts, the Court failed to order disclosure and to compel answers to various specified questions. We contend this too was erroneous and prejudicial.

As will be further developed as part of various arguments made below, the trial court granted (in part) the broadcasters' Motion for Summary Judgment. This ruling by the Court for all intents and purposes actually decimated the petitioners' case. Indeed, the jury ultimately found the broadcasters not guilty.

II

Conceding, as we must, that our petitioners certainly had the burden of proving the falsity of certain statements made, "of and concerning" them, certain segments in Dr. Davis' (the coroner)

evidence should be deemed conclusive proof this burden was fully satisfied. Here we refer to the following testimony:

> Q. ... Now, this is the statement released by Mr. Baldridge to the public. The statement reads: "The House of Wheat Funeral Home is under investigation in connection with the finding of some bags of human organs in the Great Miami River. The organs were traced to the House of Wheat and the Coroner's letter states that the funeral home signed for the bags and viscera at a local hospital and performed the funeral." Now, did you trace all the bags of body parts that you found to St. Elizabeth's Hospital and through St. Elizabeth's Hospital to the House of Wheat Funeral Home?
>
> * * *
>
> MR. WILLIS: I understand that. I'm just asking whether or not that's a true statement. My question to you is: Did you trace all the organs that were found along the

banks of the Miami on the 29th and 30th through St. Elizabeth's Hospital to The House of Wheat?

A. No, we did not. All six bags were not traced to the House of Wheat. One bag was.

Q. So that's a false statement, isn't it?

A. I suppose so because -- Yes, that's -- The organs were traced to the House of Wheat, and the Coroner's letter states that the funeral home signed -- The Coroner's letter states that the funeral home signed for the bags and the viscera at the local hospital and performed the funeral. (Reading) Which letter are they referring to in that?

Q. They're referring to your letter.

* * *

A. To the State Board of Embalmers?

Q. Yes. Second page. I'm sorry.

* * *

A. (Witness reading to himself.) What my letter ... says is: "In interviewing Dr. Kramer, the autopsy physician, it was learned that after completion of the post-mortem examination at St. Elizabeth, the viscera was placed in two plastic bags, one of which was placed in the body cavity and the other placed with the body to be picked up by the funeral director. . . The remains were then placed in the hospital morgue and later turned over to the House of Wheat Funeral Home."

Q. Yes, now here we're talking again about the finding of some bags -- That's more than one -- of human organs. Then the organs -- again referring to those that were in the bags -- were traced to the House of Wheat and through the House of Wheat -- were traced to the House of Wheat and to the funeral home. Is that a true statement?

* * *

A. We did not trace all six bags to the House of

Wheat, no.

* * *

Q. This says on July the 29th and 30th six bags were discovered along the banks of the river near West Carrollton. The human organs were traced to St. Elizabeth Medical Center partly because the bags were marked. Is that a true statement?

A. Not precisely. It's not precise. The bag was traced to St. Elizabeth Medical Center, not the bags.

Q. Okay. That says bags?

A. If you're referring to all six bags, again all six bags were not traced to St. Elizabeth Hospital to my knowledge.

Q. And it also says the bags were marked. Is that a true statement?

A. The bag was marked, but not the plurality.

Q. That means that that's a false statement, doesn't it?

A. Well, one of the bags was, one of the bags.

* * *

Q. Is this a true statement? "Investigative sources tell us they traced evidence to St. Elizabeth's Hospital where bodies and organs were picked up following autopsy, following the autopsy; is that a true statement?

A. That is not precise. It's not. They picked up a body.

Q. A body, a body. And this word here, bodies, that's plural. That means more than one?

A. That's correct.

* * *

Q. You understand from "the" viscera refers to the viscera that the Coroner's -- that had come into the possession of the Coroner's Office?

A. The viscera could be -- the viscera, the multiple organ parts in one bag or several bags.

* * *

A. I think's it's -- that particular one, now the

others are but this one is particular, for dumping the viscera. Viscera is plural, it could be viscera within one bag or viscera within six. He may have meant one bag or more, but that's a true statement as far as I'm concerned.

Q. Yes, but if he meant one bag, that would have been something that he could have easily said, right?

A. I don't write up the newscast. Mr. Hurley and Mr. Wright, I'm sure collaborated on the content of that newscast.

Q. Thank you. . . . Statement made March 2nd, eleven p.m. "We know a little more tonight about that grisly discovery we told you about yesterday. Six bags of human organs were found here along the banks of the Great Miami River in West Carrollton last July. Investigators have traced the bags back to St. Elizabeth where autopsies on the bodies were performed." Is that a true statement?

A. All except bodies. That's plural. The body that we had -- The single

body we had traced was traced back to St. Elizabeth Hospital. That's true, but the statement was such, where autopsies on the bodies, plural, were performed is inaccurate.

Q. What about this up here: "Had traced the bags back to St. Elizabeth?" Again in context, we're talking about six bags?

A. And that, too, but again we did not release the precise information to anyone as has already been stated.

Q. But the fact remains that's a false statement because bags were not traced to St. Elizabeth and you cannot say even today that those other bodies other than Delma Shine were autopsied at St. Luke -- I mean, at St. Elizabeth's Hospital; that's true, too, isn't it?

A. That's true. (R 966-974.)

In taking specific exceptions to the jury charges (R 1721-1728 & 1729-1730), one of the points emphasized to the Court was that:

> We object to the Court's instruction whereby the Court in one breath stated that a privilege could be vitiated by malice and the next breath stated that malice was not a part of the case. We feel that's ambiguous and confusing, and that it magnifies the harm that was delivered to the Plaintiff's case when the express malice was eliminated, although the evidence certainly set forth sufficient elements to require its inclusion. (R 1730.)

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

The decision by the Ohio Court of Appeals that its code (i.e., R.C. of Ohio, §2739.04) provides an absolute privilege of non-disclosure deprives libel plaintiffs who must prove actual malice of their constitutional right of due process. One of the earliest cases involving compelling disclosure of confidential sources in a defamation action is Garland v. Torres, 259 F.2d 545 (2d Cir. 1958), cert. denied, 79 S. Ct. 237 (1958). There the Court, in ordering

disclosure, accepted the premise that compulsory disclosure may infringe upon First Amendment freedoms. However, the Court reasoned that the plaintiff undeniably had a right to present her claim to its fullest. In so doing the Court effectuated a balancing standard wherein the interest to be served by compelling disclosure must outweigh the impairment of those related to the First Amendment. This balancing process has been widely adopted. See, e.g., Miller v. TransAmerican Press, Inc., 621 F.2d 721 (5th Cir. 1980); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977).

When, as here, the libel plaintiff must plead and prove actual malice, it becomes most essential that the plaintiff must be allowed to discover what the publisher knew about his subject.

Critical to what the publisher knew is how, and frequently from whom, the information was obtained. For indeed if the source can be shown to be totally unreliable, then inferences of actual malice can arise.

In our case the respondents published glaring misinformation to the public asserting that petitioners had a dumpster on their property into which they were disposing viscera. Not only did these petitioners deny disposing of viscera in that manner, they categorically denied ever having had, or having used a dumpster. On the other hand, the newscaster, Wright, adamantly maintained that he had obtained verification from an undisclosed dumpster company (allegedly the company that actually provided service for the petitioners' supposed dumpster). Faced

with these facts petitioners contacted the local dumpster companies and each response received denied providing service to the petitioners.

The petitioners contend that if R.C. of Ohio, §2739.04 provides an absolute privilege, then individuals such as the petitioners can be effectively barred from having their claims properly aired because of the arbitrary denial of access to information which could prove actual malice by showing:

(a) the asserted existence of a source is a fabrication; or

(b) the source was so unreliable that reliance upon and publication of his information was a reckless disregard for the truth.

ARGUMENT NO. I

False Light Is A Viable Cause Of Action Which Can Be Maintained Without Proof Of "Actual Malice".

The separate categories of "invasion of privacy" torts have been specifically recognized in Ohio's various Courts. See, Jackson v. Playboy Enterprises, 574 F. Supp. 10 (S.D. Ohio, W.D. 1983); Housh v. Peth, 165 Ohio St. 35, (1956); Guccione v. Hustler, 64 Ohio Misc. 59, 412 N.E. 2d 952 (Ohio Ct. App. 1981); Zacchini v. Scripps-Howard Broadcasting Co., 47 Ohio St. 2d 224 (1976).

A. Invasion Of Privacy

This tort is based upon the overt acts of the intruder and not upon the subsequent publication of information. While the tort derives from

common law trespass, intrusion claims now arise in three general categories: surreptitious conduct as contended under our facts, traditional trespass, and instances where consent to enter into a secluded setting for one purpose has been exceeded by the invitee, as was the case herein. See, Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971); LeMistral, Inc. v. Columbia Broadcasting System, 61 A.D. 2d 491, 402 N.Y.S. 2d 815 (1st Dept. 1978).

The arbitrariness of the court's stated conclusions (App. 365-366) is exposed by the fact that nowhere in the Record is it established that Wayne Wheat spoke "openly", a conclusion that ignores facts showing (at least from Wheat's perspective) that there were terms and conditions. Even this is not all, subsequent acts by Wheat's counsel have

nothing to do with his privacy status on an earlier date.

B. False Light

In Cantrell v. Forest City Publishing Company, 419 U.S. 245 (1974), this Court found that the evidence was sufficient to support a finding that the article portrayed the family in a false light through publication of knowing or reckless untruths. The main "untruth" relied on by the Court was the statement that Mrs. Cantrell was "wearing the same mask of non-expression she wore at her husband's funeral" when, in fact, the reporter had not interviewed or seen her for this follow-up article.

The question left open by the court in Cantrell is whether, in view of Gertz, "a State may constitutionally apply a more relaxed standard of liability [than

"actual malice"] for a publisher or broadcaster of false statements injurious to a private person, or whether the constitutional standard announced in Time, Inc. v. Hill, 385 U.S. 374 (1961), applied. However, the trial court here ruled that constitutional malice was required (App. 368).

In our judgment, these petitioners were placed in a false light by the respondents. Indeed, either directly or by innuendo they were made to be guilty of a criminal offense, or at the least, guilty of professional misconduct.

What can be distilled then is that genuine issues of material facts existed. At a minimum, these included but were not limited to, (1) Did the respondents' act exceed the scope of the petitioners' consent? (2) Were the broadcasts a distortion? (3) Were the broadcasts

embellished? And (4) Were the broadcasts true? Given that, summary judgment was inappropriate as to all issues of invasion of privacy.

ARGUMENT NO. II

The Privilege Of Neutral Reportage Can Only Protect Fair And Impartial Reports, Which Reports Are Neither Fair Nor Impartial When They Contain Embellishments Or Interpretations.

For any report to be "fair and impartial" it obviously must be without embellishment and the publisher's interpretation. However, these broadcasts were gaudily embellished and interpreted. In point of fact the respondents added visual effects, aids, accoutrements, and their own interpretations. One instance of

embellishment was showing a picture of a dumpster, which was pictorially alleged to have been the petitioners'. Also, the respondents stated as fact throughout the broadcasts (among other things) that the petitioners had received the viscera (App. 238), and that Landry had filed a complaint (App. 242). They even added their own interpretation of the evidence:

> Cliff Wright: With its power to investigate and the power of subpoena and with all evidence pointing to Wheat Funeral Home, (App. p. 250).
>
> Cliff Wright: Meanwhile, the coroner's investigation continues and all thus far appears to point to the House of Wheat Funeral Home on Williams Street (App. p. 247).

The inclusion of their own embellishments and interpretations void any contention that the broadcasts were "fair and impartial." Cianci v. New Times Publishing, 639 F.2d 54 (2nd Cir.

1980).

ARGUMENT NO. III

The Statutory Privilege Created By R.C. of Ohio, §2317.04, Is Unavailable Where The Matter Reported Has Not Been "Presented, Filed, Or Issued" In Any Proceeding Before The Board.

In it's grant of partial summary judgment, the court identified the central issue as being "whether the broadcasts constitute a 'fair and impartial report' of official documents presented to the Board of Embalmers and Funeral Directors of Ohio ("Board") by the Coroner or other persons" (App. 371). The blunt fact is that the most critical issue was resolved by the court on the basis of the flawed premise that is clearly indicated in the court's framing of the issue as quoted above.

Clearly then, by any interpretation of the concept here involved there can be no privilege. This is not only the position taken by a majority of American Courts, it is the law in Ohio. See, R.C. Of Ohio, 2317.04 and Sanford v. Boston Herald-Traveler Corp., 318 Mass. 156, 61 N.E. 2d 5 (1945). While this argument was raised on the appellate level, that court refused to address its merits by ruling that the party who prevails on a Motion for Summary Judgment cannot challenge the ruling. What the Court failed to realize is that what is being challenged is the delineation of the issues for trial.

Simply put, there were no proceedings before the Board. Therefore, when the court framed the issue for trial, it did so despite the clear lack of any evidence supporting the existence

of a formal proceeding. Simply stated then, the court erred in several ways. First, as discussed above, the court made a factual determination that some "proceeding" within the meaning of §2317.04 was being conducted by the Board, which finding was not proper in a Motion for Summary Judgment.

Second, while the petitioners contended that the letters had not been "presented to" the Board (App. 300 et. seq.) and the contrary position was adopted by the respondents, the court resolved this factual determination in the respondents' favor (App. 371), despite the clear rule that the facts alleged by the petitioners were to be taken as true.

ARGUMENT NO. IV

The Privileges Given To Newsmen And Certain Others To Make Statements About Newsworthy Events Is Qualified; Hence, Does Not Apply Where The Publisher Thereof Espouses Or Concurs In Any Charges Made Or Deliberately Distorts The Statements To Launch A Personal Attack.

(A)

The qualified privileges, including the one created by R.C. of Ohio, §2317.04, were relied on by the Broadcasters (App. 202-211) and the courts below as a cure-all or panacea (App. 371 & R. 1713-1714). However, this Court will surely recognize that any right to report on proceedings before an

administrative body cannot be extended to reporting unsworn accusations stated in a letter addressed to such agency. Cf., Village of Grafton v. American Broadcasting Company, 70 Ohio App. 2d 205, 435 N.E. 2d 1131 (1980).

As to these issues, the views expressed in Sanford v. Boston Herald-Traveler, Corp., (cited elsewhere), are most persuasive. Here, the Sanford court held "the right to report court proceedings does not extend to reporting accusations contained in papers filed [even] in a court and not yet brought before a judge or magistrate for official action." Id., at p. 6.

So postured, what actually has happened here is the whole doctrine of qualified privilege was tortured by the courts below and the broadcasters. For

not only was there the lack of a requisite proceeding to serve as a basis for any reliance on the asserted privilege, the letter itself failed to qualify as a document. Indeed, what was referred to as a document hardly furnished any basis for the defamatory statement that an official complaint had been filed with the Board (App. 1160).

(B)

Also, in this case the trial court instructed the jury that the "defense of qualified privilege gives protection to any defendant making a false publication where the broadcaster and the public have a common interest" (R 1713).

Here it seems the court was, first of all, fully convinced the reports made to the public concerning the dumpster episodes were, or could be, deemed (a) a fair and true report to the public of an

administrative proceeding. Or, (b) an example of the privilege allowed newsmen to report fairly and accurately, statements made by public officials (-- here, the coroner, who wrote the letter containing the defamatory falsehoods to the Board of Embalmers and Funeral Directors of Ohio).

As argued elsewhere in this Petition, the news accounts here involved cannot be defended as being related to any official proceeding. And, just as surely a defamatory statement attributed to a third party in a letter can hardly be said to have the protection allowed by the court's instruction. See, Gobin v. Globe Publishing Co., 216 Kans. 223, 227-228; 531 P. 2d 76, 80-81 (1975).

It is, of course, very true that Edwards v. National Audubon Society, Inc., 556 F.2d 113 (2d Cir. 1977), did

enunciate, what some have called, a new constitutional privilege of neutral reportage. Under this doctrine, protection is afforded statements made by public persons about newsworthy events, where the report made thereof is fair and accurate. However, even this privilege does not apply where, as here, the publisher thereof "espouses or concurs in the charges made ... (or) deliberately distorts (the) statements to launch a personal attack .... In such instances he assumes responsibility for the underlying accusations." (Id., 120).

Putting aside, for a moment anyway, the statutory privilege, it seems clear enough that the privilege of fair comment that existed at common law applied only if the facts relied on were true and was lost if the disclosed facts were not true -- the situation here. See, Cianci v.

New Times Publishing Co., 639 F.2d 54, 63-67 (2d Cir. 1980).

In this case it seems so very clear that both the trial court and our respondents, and possibly the Motion judge as well, have confused the concepts of neutral reportage with the obsolete doctrine of fair comment. While somewhat akin, they are certainly separate concepts.

This being so, a central contention made in the Answer to the Complaint (-- that is, the statements if not true were reasonably believed to be so), makes about as much sense as the specific inclusion in the Answer of the offenders' assurances that in any event, the broadcasts were not made maliciously. The same assailment applies with equal force to (a) the court's indefensible elimination of all facets of malice from

the case, and (b) the submission of these convoluted defense theories to the jury, enveloped as they were such that the instructions were really indecipherable and inapplicable.

CONCLUSION

All of the arguments made above make it at once clear that certiorari should be granted so the case can be reviewed and reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition For Writ of Certiorari was mailed to the office of David C. Greer of the law firm Bieser, Greer & Landis, 400 Gem Plaza, Dayton, Ohio 45402, by certified mail, return receipt requested, this _____ day of August, 1986.

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